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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of

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Usage of the Public Switched
Network by Information Service
and Internet Access Providers

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CC Docket No. 96-263

REPLY COMMENTS OF
THE NATIONAL CABLE TELEVISION ASSOCIATION

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TABLE OF CONTENTS

I.	INTRODUCTION AND SUMMARY	1
II.	THE LECS DO NOT HOLD EXCLUSIVE INTERNET ACCESS FRANCHISES	3
	A. The LECS' Calls For Special Treatment Should Be Perceived in Light of Historical Parallels.....	3
	B. The Initial Reliance of ISPs on the PSTN Does Not Justify Special Treatment Over the Long Term	5
III.	IMPOSING USAGE-BASED INTERSTATE ACCESS CHARGES ON ISPS WILL SEND THE WRONG ECONOMIC SIGNALS TO THE MARKETPLACE AND WILL NOT RELIEVE NETWORK CONGESTION IN AN EFFICIENT MANNER	6
	A. The LECS Are Wrong to Insist Upon Immediate ISP Access Charges When the Existing Scheme is Laden With Subsidies	7
	B. Imposing Usage Charges on ISPs Will Not Incent LECs to Build Advanced Networks; It Will Merely Overcompensate LECs for Investing in Existing Out- moded Technology.....	9
	C. Imposing Usage-Based Interstate Access Charges on ISPs is Not an Efficient Means of Relieving Network Congestion, and Will Reduce Demand for Internet- Based Services	12
	D. Cable Networks Will Offer an Optimal Alternative to the PSTN for Transmission of Internet Access	15
IV.	CONCLUSION.....	16

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The National Cable Television Association ("NCTA"), by its attorneys, hereby replies to the Comments submitted in the above-captioned proceeding.

I. INTRODUCTION AND SUMMARY

NCTA's comments endorsed the Commission's issuance of this Notice of Inquiry as a timely effort to gather additional information concerning the implications of Internet growth on the Public Switched Telephone Network ("PSTN"). NCTA noted that while the issue of how enhanced services ought to be regulated has been around for some time, the renewed call by some LECs for imposition of an Internet access charge warrants another look at the matter.

NCTA urged the Commission not to proceed from the perspective that LECs hold an exclusive "franchise" for the delivery of Internet access. Rather, the primary reliance upon the circuit-switched PSTN to deliver Internet access is almost certainly a temporary phenomenon. The demand for Internet access services, and the significant comparative advantage of broadband networks to efficiently transmit information at high speeds, will cause market participants to identify new and better solutions.

Cable companies can play a central role in providing these better solutions. Cable's broadband architecture is ideal for delivering the tremendous amounts of information the Internet has to offer. Cable facilities are particularly ideal for the transmission of bit-rich graphical displays which, when delivered over conventional telephone lines, take far too much time to appear on the consumer's video screen. By utilizing cable's Internet access alternative, consumers will be able to receive the full benefits the Internet has to offer on a virtual "real-time" basis.

The purpose of this proceeding is to examine the implications of the use of the PSTN by providers of information services and Internet access. The Internet will have an impact on the PSTN in at least two ways. First, to the extent the PSTN is used to transmit Internet services, the PSTN will at least over the short term experience increased traffic demand to accommodate Internet users. Second, LECs and others will respond to the demand for Internet transmission services, including demand for wider bandwidth to carry graphics and operate at increased speeds, by developing technological alternatives to the PSTN.

The Commission's goal should be to foster a competitive market in the transmission of Internet access services. ISPs and end-users should have available multiple transmission options from which to choose. These options may include cable networks, wireless networks, the circuit-switched PSTN and technological enhancements of LEC networks, among others. The record fails to demonstrate the need for increased transmission charges on ISPs during the interim period before the technological alternatives become available and are implemented. In fact, by drawing revenues away from ISPs and end-users, an Internet access charge is likely to limit the revenues available to support new content offerings and support for development of the advanced non-LEC networks that are optimal for delivering broadband services over the Internet.

II. THE LECS DO NOT HOLD EXCLUSIVE INTERNET ACCESS FRANCHISES

LECs have never been awarded exclusive Internet access franchises. Nor are they entitled to such franchises. Yet, certain of their comments proceed from the presumptuous notion that the main policy question to be resolved in this proceeding is the impact of the new business on their existing business.¹ The Commission should reject this “telco-centric” approach.

Internet access should be perceived as a new service untethered to other service offerings. Providers of Internet access should be allowed to compete freely for the allegiance of intermediaries and end-users. Regulation should not skew the marketplace in favor of individual players, and particularly not in favor of incumbents.

A. The LECs’ Calls For Special Treatment Should Be Perceived in Light of Historical Parallels

It is common practice for incumbents, faced with potential competition from a new technology or service potentially competitive to their existing offerings, to seek a preferred market status in the new offering. Rather than treat incumbents as just one of the competitors in the new service, the Commission has been too willing over the years to grant incumbents this preferred status in new markets that would have thrived even if the incumbents did not participate at all. Certain LECs seek preferred status in Internet access,² even though there is no evidence this new business arena will not thrive without government conferral of special status on the incumbent LECs.

¹ See, generally, Section II. B., below.

² See, e.g., Comments of the United States Telephone Association, CC Docket No. 96-263, Mar. 24, 1997, at ii (“USTA Comments”); Comments of Pacific Telesis Group, CC Docket No. 96-263, Mar. 24, 1997, at 6 (“Pacific Comments”); Comments of The Southern New England Telephone Company, CC Docket No. 96-263, Mar. 24, 1997, at 8 (“SNET Comments”).

The strategy pursued by LECs has origins that are at least half a century old. In the mid-1940's, in response to the development of microwave technology during World War II, the Commission commenced a proceeding to determine how microwave service might be deployed commercially. The first widely available mobile radio services were an outgrowth of this proceeding. The incumbent LECs, in the form of AT&T, successfully sought frequencies reserved for wireline carriers, even though mobile radio was not a wireline service.³

AT&T employed the same strategy to monopolize microwave radio distribution for the new television medium. Through insistence upon a reserved common carrier allocation, and refusals to interconnect with private carriers and other common carriers, AT&T succeeded by the mid-1950's in achieving a monopoly over nation-wide transmission of television network distribution services that remained in place for more than a decade.⁴

When the Commission proposed authorization of cellular service, AT&T contended that wireline carriers were essential to the success of cellular, and successfully argued once again that a block of frequencies should be reserved for wireline carriers.⁵ Even though the cellular service was initially at most an adjunct to the basic telephone service, the Commission was persuaded to award incumbent LECs guaranteed cellular licenses in every market. It is clear more than a decade later that the cellular service would have been successful without the reserved wireline

³ General Mobile Radio, 13 FCC 1190, 1218 (1949).

⁴ See, e.g., Plaintiff's Response to Defendants' First Set of Interrogatories, United States of America v. American Telephone and Telegraph Company, Civil Action No. 74-1698, Dec. 15, 1976, at 73-74.

⁵ Cellular Communications Systems, 86 F.C.C. 2d 469, 487-93 (1981).

set-aside. The cellular wireline allocation was a competition-inhibiting government giveaway to already successful LECs involving tens of billion of dollars.

The development of true competition to broadcasters was delayed for decades because of the Commission's misguided concern that the growth of cable television and other multichannel services posed a threat to the viability of "free television." More than 30 years after the Commission first acted to protect broadcasters from the nascent cable medium, so-called "free television" is thriving in the face of multichannel penetration in excess of 70 percent, and substantially expanded consumer choice.

Each of these efforts to guard incumbents from competition have been recognized subsequently as errors in policy. The explosive growth of the Internet has caused some LECs to try to persuade the Commission to adopt another incumbent protection policy. To do so would be an obvious mistake.

**B. The Initial Reliance of ISPs on the PSTN Does Not Justify
Special Treatment Over the Long Term**

This history furnishes a context to the incumbents' requests here. Several LECs, in the guise of protecting the telephone network, ask the Commission to secure for themselves a pre-eminent role over the long term in the transmission of Internet access. USTA maintains that "Continued growth of the Internet and the public switched network depends on industry participants having the right incentives for investment and network use."⁶ Pacific contends "... current policies pose a significant obstacle to just sustaining, let alone accelerating, the development of

⁶ USTA Comments at ii.

Internet access.”⁷ SNET argues that declining to impose an Internet access charge on ISPs constitutes “government protection” of ISPs.⁸

Contrary to these claims, it is actually LECs that argue for “government protection.” It is LECs who presume that because the PSTN is used now to provide Internet access, they are entitled to subsidization while they modify their networks to accommodate wider bandwidth services and to a protected position once the modified networks are in place. LECs ask for regulatory changes at the expense of their customers and their competitors so “industry participants” (principally themselves) have the “right incentives.” LECs insist that existing arrangements “pose a significant obstacle ... to the development of Internet access.”

The cable industry is committed to the provision of Internet access over state-of-the-art transmission networks. Cable companies are prepared to engage in a no holds barred competition for Internet access business. LECs should withdraw their requests for special treatment and do the same.

III. IMPOSING USAGE-BASED INTERSTATE ACCESS CHARGES ON ISPS WILL SEND THE WRONG ECONOMIC SIGNALS TO THE MARKETPLACE AND WILL NOT RELIEVE NETWORK CONGESTION IN AN EFFICIENT MANNER

In a textbook case of placing the cart before the horse, several LECs urgently call upon the Commission to immediately impose an access charge on ISPs or their customers. They argue that the absence of an access charge on information services improperly subsidizes ISPs, and the appropriate response is to immediately apply the access charge scheme to all ISPs. Swift application of the blunt instrument of access charges to all ISPs cannot be justified on the record.

⁷ Pacific Comments at 6.

⁸ SNET Comments at 8.

A. The LECs Are Wrong to Insist Upon Immediate ISP Access Charges When the Existing Scheme is Laden With Subsidies

Several LECs urge the Commission to impose promptly the access charge scheme on ISPs. ISPs, they argue, use the network in the same manner as interexchange carriers and therefore should similarly pay access charges in the same way as interexchange carriers. They further contend that ISPs impose unique costs on the network that should be recovered from ISPs. Failure to recover these costs from ISPs, they argue, will burden other users, retard Internet development and lead to network degradation.

Pacific Bell is particularly outspoken in this regard. Asserting that reform is needed now, it argues:

The ESP exemption is retarding the growth of the next wave of Internet development. The Commission should take action now to remove the price control of the ESP exemption and allow data solutions to emerge -- only this Commission has the national scope and mandate to ensure that this will happen.⁹

Without acknowledging that numerous subsidies in the telephone pricing system remain, the company further contends with respect to potential cross-subsidy that "The answer must be the same as it has always been for successful and healthy economic development -- let the cost-causers pay the costs, and let competition in the marketplace determine the winners and losers."¹⁰

Other telcos also call for prompt action. Southwestern Bell supports the imposition of an access charge on ISPs as part of the Access Charge Reform proceeding.¹¹ And GTE, claiming it faces "a cost recovery crisis that will only grow in terms of both immediacy and magnitude if

⁹ Pacific Comments at 25.

¹⁰ Id. at 35.

¹¹ Comments of Southwestern Bell Telephone Company, CC Docket No. 96-263, Mar. 24, 1997, at 14 ("Southwestern Bell Comments").

current projections regarding Internet usage are correct,”¹² “urges the Commission to move quickly in this and ... related ... proceedings.”¹³

But whatever the merits of imposing an Internet access charge following completion of Universal Service reform, Access Charge Reform, Separations Reform and related proceedings (and they are dubious at best), there is no justification for imposing such a charge over the short term. The current system of interstate telephone pricing is characterized by massive subsidies implemented by the Commission over decades in furtherance of a variety of policy objectives. Until these subsidies are removed, and the Commission can declare that rates are truly cost-based (i.e., based upon forward-looking cost), there is no justification for even considering the imposition of an interstate access charge on ISPs.

Moreover, as MCI points out,

“[S]ince the incumbent LEC’s are actively marketing their own new Internet operations, requiring ISPs to pay inflated access charges causes a serious competitive problem. Just as incumbent LECs can use inflated access charges to create a price squeeze in the interexchange marketplace, inflated prices for access charged to ISPs would create a price squeeze in the Internet service market. The incumbent LEC would charge the inflated cost of access to unaffiliated ISPs while incurring only the economic cost. The benefits could then be passed on to its own Internet operation.”¹⁴

Permitting imposition of an Internet charge now, when the subsidies in the access structure have not been removed and LECs are actively pursuing plans to offer the service, will seriously disadvantage ISPs and their customers and threaten the long-term development of competition.

¹² Comments of GTE, CC Docket No. 96-263, Mar. 24, 1997, at 29 (“GTE Comments”).

¹³ Id. at 34.

¹⁴ MCI Comments at 3.

B. Imposing Usage Charges on ISPs Will Not Incent LECs to Build Advanced Networks; It Will Merely Overcompensate LECs for Investing in Existing Outmoded Technology

Certain LECs attempt to create the misimpression that they are not receiving any additional revenues to compensate for the increased usage of their network when it is used to transmit Internet access. This is, of course, untrue. ISPs must purchase additional business lines to satisfy the requirements of their customers. And, customers commonly purchase second lines so that their primary telephone line remains free while they are accessing the Internet. LECs charge for these functions, and these charges compensate for the costs associated with the provision of these services.¹⁵

LECs complain they are not receiving enough revenue to cover the costs of the services they provide. GTE, for example, contends that the regulated rates for the transmission services used by residential customers “are typically set substantially below cost.”¹⁶ To the extent residential service prices are not compensatory, this is a problem for residential service pricing policies, not Internet access pricing.

LECs also complain about the tendency of Internet access customers to use telephone lines for significantly greater durations than users of voice calls. GTE maintains that “the

¹⁵ As MCI observes, “The Regional Bell Operating Companies (RBOCs) that support a policy forcing ESPs to pay current inflated access charges are simply trying to turn these companies into another source of excess overcharges to pad the RBOC bottom line. The RBOCs, by focusing on the cost of increased demand, ignore two important points about the benefits they receive from the increased growth of ESPs. First, ESPs, while not paying access, are still paying to use the network. They are paying like other business users through the monthly purchase of business lines. As the popularity of on-line services has increased, so have the revenues generated through the purchase of business lines. Second, the growth in popularity of ESPs has been generating significant new revenues for the RBOCs from second lines which have very little cost associated with them, and from their own Internet access services.” MCI Comments at 3.

¹⁶ GTE Comments at 23.

average duration of an ISP-related call is 15-16 minutes, while the average duration of a voice call is only 3-4 minutes.”¹⁷ GTE claims that network resources required for an ISP call are as a result four to five times that of a voice call.¹⁸ Other LECs claim they have found similar results.¹⁹ Since telephone networks have been engineered based upon the traffic patterns of voice calls, and Internet calls disrupt this pattern, LECs contend new access charges should be imposed upon Internet transmissions to compensate for the increased costs resulting from the greater usage. The increased charges are needed, LECs argue, so that they are able to develop and implement technological solutions to Internet-induced congestion

U S WEST contends these “technological solutions are costly. The existing ability of all ISPs to use the circuit switched network on a flat-rate basis means there is little economic or market incentive for ESPs to support technological solutions to problems which, from the ESPs’ perspective, do not exist.”²⁰ U S WEST further argues that imposition of an Internet access charge “will send proper economic signals to ESPs and LECs alike [and] can go a long way towards improving ESP and LEC technology and the nation’s access to the benefits of new information technology and the new information market.”²¹

¹⁷ Id. at 23.

¹⁸ Id. at 23-24.

¹⁹ See, e.g., Austin Communications Education Services, Incorporated, “On Adverse Effects of Continuing Temporary Cost Subsidies to the Commercial Internet Services Industry,” submitted with Comments of the United States Telephone Association, CC Docket No. 96-263, Mar. 24, 1997, at 21-29 (“Austin”).

²⁰ Comments of U S West, Inc., CC Docket No. 96-263, Mar. 24, 1997, at 26-27.

²¹ Id. at 27.

Certain LECs miss the point. The circuit-switched network will prove increasingly insufficient as ISPs and web sites develop and offer more sophisticated images that require more capacity. The solution is new types of networks. Southwestern Bell, for example, acknowledging the limitations of the PSTN, is in the process of deploying a packet-switched service, Internet/Intranet Transport Service ("IITS"), "in which end-user calls to ISPs are routed to and through the IITS data platform rather than over SWBT's circuit-switched network."²² The solution, as Southwestern Bell recognizes, are services such as IITS and cable modems.²³ There is no reason why users of the existing networks should pay in advance for the development of these new networks by incumbents.

All players should have the opportunity to compete by offering these networks without the Commission taking sides. Imposing an Internet access charge on ISPs will tilt the competitive marketplace decidedly in the direction of the LECs by reducing the revenues that ISPs have over the short-term that can support the network or networks they prefer over the long-term. The long-term goal of a competitive Internet access marketplace may never be achieved if LECs are able, through the regulatory process, to sufficiently squeeze revenues from ISPs that would otherwise go to the support of competitive advanced networks. Like other businesses, if LECs determine that existing facilities are inadequate to serve new markets and they want to compete in these markets, they should have the opportunity to risk their capital by competing like other market participants. But they are not entitled to a Commission policy that handicaps their competitors.

²² Southwestern Bell Comments at 7.

²³ Id. at 8.

C. Imposing Usage-Based Interstate Access Charges on ISPs is Not an Efficient Means of Relieving Network Congestion, and Will Reduce Demand for Internet-Based Services

The Notice of Inquiry seeks information from LECs in support of any claims that Internet usage is imposing undue burdens on the PSTN. LECs are invited to demonstrate that the existing mechanisms that allow for compensation are inadequate, and that new mechanisms should be instituted.²⁴ In their comments, the LECs simply fail to make the case that any Commission action is required.

Those favoring an Internet access charge attempt to bootstrap a few alleged examples of possible Internet-generated switch congestion to argue for national rules. Little actual congestion is demonstrated in response to the Commission request for actual data demonstrating congestion. Moreover, LECs fail to show that the claimed congestion problem will increase over time, or that technological solutions and competition will not significantly ameliorate the claimed risks.

Selected LECs try but fail to show that Internet congestion is a genuine and current broad-based problem requiring regulatory action. USTA submits with their comments a study prepared by Austin Communication Education Services, Incorporated ("Austin") which purports to show that Internet usage is placing a substantial burden on the PSTN that should be paid for by

²⁴ The Commission states:

We encourage commenters to provide data on the characteristics of information service usage and its effects on the network. We are particularly interested in data on the incumbent LECs' costs directly related to ESPs' use of the PSTN, on incumbent LECs' revenues attributable to ESP traffic (including second phone line revenue), and in a comparison of what PSTN services ESPs desire, as opposed to what they currently have access to.

Notice of Inquiry on Implications of Information Service and Internet Usage, FCC 96-488, rel. Dec. 24, 1996, at par. 315 (citation omitted).

imposing usage charges on ISPs.²⁵ Austin reviews case studies by Bell Atlantic, NYNEX, Pacific, North Pittsburgh Telephone Company and Southern New England Telephone Company, U S West and USTA. Based on these results, Austin argues LECs are implicitly forced to subsidize ISPs in contravention of the Act's requirement that USF subsidies must be explicit.²⁶

Similarly, Pacific Bell supports its call for relief by claiming that 62 of its 772 switches have experienced "traffic exceeding normal network thresholds, and performance has been degraded below network standards."²⁷ The company submits a study purportedly illustrating Internet-induced congestion in three central offices and concludes that "The examples demonstrate that Internet congestion is not a theoretical or isolated problem. It has real and widespread effects on Pacific Bell's facilities and normal voice customers and will not subside so long as the ESP exemption allows ESPs to avoid paying for use of the telephone network."²⁸

Even assuming the validity of these studies, the alleged network congestion in Pacific's three central offices, and the evidence presented with respect to the other LECs, is insufficient to demonstrate a widespread condition. And even though these central offices have apparently experienced increased demand thereby necessitating expenditures to satisfy customer requirements, it is by no means clear from the record that these LECs' increased expenditures are anything but the normal cost of doing business for which they will be properly compensated over

²⁵ Austin at 59-60.

²⁶ Id. at 33.

²⁷ Pacific Comments at 29.

²⁸ Id. at 29-30.

the long term. LECs are not entitled to rate increases for their most inelastic services every time these services incur increased costs.

The LECs' studies share the common theme that the LECs are not properly compensated for the use of the PSTN to transmit Internet access, and as a consequence advanced networks will not be constructed. Yet, as noted, LECs receive some compensation for the basic service offering and additional compensation through payment for second lines. They offer their own Internet access services and will be compensated for that. As Austin states, "There is no disagreement that ... [circuit-switched capacity]... is an inappropriate technology for connections to the Internet and that packet-switched circuits would be preferable."²⁹ But it does not follow that ISPs should bear the burden of helping LECs respond to the inadequacy of their own networks.

The Commission should reject special treatment for the LECs, and in the process act to promote the widest possible use of the Internet. Without stating so explicitly, the LECs are seeking Commission endorsement of a strategy that will, if successful, increase network costs to ISPs and, as a result, reduce the ability of ISPs to develop content-based services. To the extent these charges are passed along to consumers, overall demand for the Internet will be reduced. While this may relieve the purported intermittent network congestion, it will also reduce the number and variety of services available to consumers, and inhibit the development of advanced networks. The bottom line is that Internet-induced network congestion has not been demonstrated. According to the February 25, 1997 minutes of the Network Reliability and

²⁹

Austin at 31.

Interoperability Council, "To date there have been no FCC reportable outages due to Internet traffic."³⁰

D. Cable Networks Will Offer an Optimal Alternative to the PSTN for Transmission of Internet Access

It is especially critical that the Commission not favor the LECs as the chosen instrument for delivery of Internet access because the marketplace is developing competitive alternatives that hold out the promise of significantly benefiting consumers. The LECs acknowledge that their networks must be altered to accommodate the greater bandwidth required of Internet transmissions. Just as the LECs' competitors must risk their capital without government assistance to develop Internet-friendly transmission systems, so should the LECs be required to invest in the changes they find necessary to satisfy customer requirements.

Cable companies' plans for Internet access have moved beyond the experimental stage and cable-provided Internet access is now being commercially deployed. Roll out of broadband Internet access services that operate at speeds hundreds of times faster than telephone-based systems are proceeding apace. Cable modem services are already available today on a commercial basis in dozens of locations.

The Commission should reject entreaties by the LECs to secure a government-conferred favored position for the provision of Internet access services by granting their request for an Internet access charge. An Internet access charge will hamstring ISPs, end users and Internet access competitors just as the service is getting started. The right course is to let the marketplace work by letting all players operate on a level playing field.

³⁰ Minutes of the February 25, 1997 Meeting of the Network Reliability and Interoperability Council, at ¶55.

IV. CONCLUSION

For the reasons stated above, the Commission should conclude that an Internet access charge should not be imposed upon ISPs and it should not proceed to a Notice of Proposed Rulemaking to further consider these matters.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Dan L. Brenner", written over a horizontal line.

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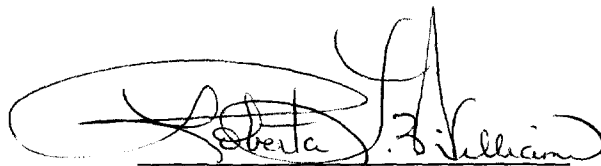
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CERTIFICATE OF SERVICE

I, Roberta L. Williams, hereby certify that REPLY COMMENTS OF THE NATIONAL CABLE TELEVISION ASSOCIATION were served this 23th day of April, 1997, to the following:

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